

### REMARKS

Applicants' thank the Examiner for his indication of allowable subject matter.

Dependent claims 12 and 21 have been amended to correct inadvertent errors wherein they depended from canceled claims. Claims 13 and 25 have also been amended to change the claim numbers from which they depend.

Independent claim 24 has been amended without prejudice to recite a preferred embodiment of applicant's invention which includes a pasteurization step. Support is provided at page 8, lines 24-28 and page 17, lines 15-17.

Independent claim 14 has been amended to correct a grammatical error.

By this amendment claims 5 and 26 are hereby cancelled without prejudice.

The present invention is directed to a method to make food products which incorporate *Lactobacillus* bacteria that are treated in such a way that the bacteria are non-viable and do not induce substantial fermentation in the food product. The lack of substantial fermentation can be evidenced by the absence of post-acidification, i.e., a lowering pH by at least 0.1 pH unit (page 6, lines 4-7).

Meister et al (US 6,010,725) is directed to the spray drying of *Lactobacillus* bacteria in such a way as to ensure that a significant fraction of the bacteria remain viable so that they can be incorporated in a food in a viable state (column 4, lines 10-40). In fact Meister et al observed that excellent survival of the microorganism is obtained when the culture of the microorganism and the food product are sprayed together. Example 1-4 of Meister et al disclose skim milk concentrates that contain as much as 16% viable bacteria.

The Office points to no teaching in Meister et al concerning subjecting either the sprayed dried bacteria or the food product containing the bacteria to any treatment that specifically renders the Lactobacillus bacteria non-viable and incapable of inducing substantial fermentation let alone the step of pasteurization. Consequently, applicant's respectfully request the 102(b) rejection over Meister et al be reconsidered and withdrawn.

Lee et al (US 3, 794,739) is directed to food which is inoculated with lactic acid producing bacteria which, "though previously rendered non-viable, still have the capacity to produce acid. If controlled fermentation of the food is desired, the inoculated food is incubated under suitable conditions" [abstract]. These properties are achieved according to Lee et al by harvesting the cells (bacteria), mixing them with glucose or another carrier, lyophilizing the mixture and then subjecting the lyophilized mixture to radiation (gamma or beta rays) at a dose from 1-3 megarads (column 1, lines 54-63). Thus Lee et al requires that the Lactobacillus bacteria be capable of inducing substantial fermentation in the food products in which they are inoculated. This is clearly evidenced in Example 2 of Lee et al by a drop in pH of 1.3 to 1.6 units. Further, the Office points to no teaching by Lee et al is concerning treatment Lactobacillus bacteria by pasteurization. It is therefore respectfully requested that the rejection based on Lee be withdrawn.

In the Office Action claims 6 and 23 were rejected under 35 USC §103(b) as being unpatentable over Froseth et al (US 6,592,915) in view of Meister et al (US 6,010,725). Applicant respectfully traverses this rejection even if Froseth is eligible as prior art to the present application, which is not acknowledged.

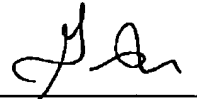
Froseth et al is directed to a cereal bar. In the Introductory Definitions in column 4, one "additive" listed is a probiotic bacteria sprinkle (lactobacillus and acidophilus).

The Office Action asserts that it would have been obvious to use the probiotic bacteria - powdered milk containing spray dried powder of Meister et al as the "probiotic sprinkle" disclosed by Froseth et al. However, applicant respectfully submits that this combination of references would not have led to applicant's claimed invention.

As discussed above, the Office points to no teaching in Meister et al concerning subjecting either the sprayed dried bacteria or the food product containing the bacteria to any treatment that specifically renders the Lactobacillus bacteria non-viable and incapable of inducing substantial fermentation, let alone the step of pasteurization. Thus, applicants submit that the combination of Froseth et al and Meister et al does not support a prima-facie case of obviousness because this combination would not have contained all of the elements present in applicant's claimed invention. Consequently, applicants respectfully request that the 103(a) rejection over Froseth et al (US 6,592,915) in view of Meister et al (US 6,010,725) be reconsidered and withdrawn.

In view of the foregoing, it is respectfully requested that the application, as amended be allowed to issue.

Respectfully submitted,



Gerard J. McGowan, Jr.  
Attorney for Applicant(s)  
Reg. No. 29,412

GJM/pod  
(201) 894-2297